



UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

April 18, 2003

The Honorable Edward J. Markey
United State House of Representatives
Washington, D.C. 20515-2107

Dear Congressman Markey:

I am responding to your letter of March 11, 2003, to former Chairman Meserve, requesting additional information about allegations of retaliation against individuals in the U.S. Nuclear Regulatory Commission's (NRC's) Region IV (RIV) office in Arlington, Texas. You noted the importance of the NRC fostering a work environment that rewards whistleblowers for their courage in disclosing safety, security, or criminal violations. Furthermore, you asked that you be provided certain information about three specific cases.

I am providing pertinent information about these cases in Enclosure 1 to this letter and I hope that this information serves your needs. The three cases have been the subject of ongoing legal processes, as you know, and we believe it is important to be mindful of the sensitive nature of these matters. In particular, please note that Enclosure 1 contains some personal privacy and sensitive personnel information and we ask that you not disclose it to the public without the consent of the referenced individuals.

In addition to requesting certain information about the three cases, you also requested responses to six questions. The questions and their responses are provided in Enclosure 2 to this letter.

The Commission recognizes the importance of ensuring that NRC fosters a work environment that does not penalize individuals for disclosing to management alleged improprieties. The Commission will take prompt and appropriate actions to address violations of law by its officials and will act to remedy significant management concerns.

Again, I hope the information I have provided will be helpful to you.

Sincerely,

Nils J. Diaz

Enclosures: As stated

CASE SUMMARIES

1. RONNEY L. BATH

41 U.S.C. Section 265 Claim

- Mr. Bath was formerly employed by U.S. Robotech, Inc., a contractor of the NRC. Robotech terminated Mr. Bath effective December 22, 2000, and indicated that he was terminated for budgetary and strategic planning purposes. On March 14, 2001, Mr. Bath filed a complaint with the NRC's Chairman under 41 U.S.C. Section 265 alleging that he was wrongfully terminated in retaliation for disclosing substantial violations of law, potential threats to public health and safety, fraud, gross mismanagement and abuse of authority. These allegations were investigated by the Office of Inspector General (OIG) as required by 41 U.S.C. Section 265. On June 4, 2001, OIG completed its investigation and found that Mr. Bath's disclosure did not relate to a substantial violation of law related to a contract. Nonetheless, NRC senior management did address the manner in which Region IV management elected to handle Mr. Bath's disclosure.
- On July 17, 2001, the NRC requested that the OIG conduct additional investigative work on Mr. Bath's Section 265 complaint. On August 13, 2001, after reviewing ten issues raised by Mr. Bath--including security and criminal issues--the OIG completed its additional investigation and found that none of the disclosures referenced in the complainant's amended complaint involved a substantial violation of law related to a contract. The OIG also determined that complainant's disclosures made to the OIG in October 2000 did not result in his discharge from U.S. Robotech, Inc. The OIG findings did not reflect the need to take remedial actions for the ten issues raised by Mr. Bath.

Section 211, Energy Reorganization Act Claim

- On June 20, 2001, Mr. Bath filed a complaint with the U.S. Department of Labor (DOL) alleging discriminatory employment practices in violation of the employee protection provision of Section 211 of the Energy Reorganization Act of 1974 (ERA), as amended 42 U.S.C. 5851. The complaint was filed against the NRC, certain NRC officials, U.S. Robotech, Inc., and the President of Robotech.
- On June 26, 2001, the NRC filed a response to Mr. Bath's DOL complaint contending that the complainant had not made the required prima facie showing under the statute, which requires that DOL dismiss the complaint.
- On August 23, 2001, the DOL Area Director issued its determination that Mr. Bath did not make a prima facie showing that any of the named respondents were covered by the employee protection provision of Section 211 of the ERA or that he notified his employer of anything that was a violation of the ERA or the Atomic Energy Act of 1954. On August 27, 2001, Mr. Bath appealed the DOL determination and requested a hearing. On August 30, 2001, the NRC moved that the complaint be dismissed for lack of jurisdiction.

CONTAINS PERSONAL PRIVACY INFORMATION
NOT FOR PUBLIC DISCLOSURE

ENCLOSURE 1

- In September 2001, Mr. Bath and U.S. Robotech agreed to mediate in an attempt to resolve Mr. Bath's complaint against U.S. Robotech and its President under 41 U.S.C. Section 265 and Section 211 of the ERA. On October 5, 2001, Mr. Bath filed an amended complaint of retaliation with the DOL.
- On December 19, 2001, Mr. Bath filed his response to NRC's motion to dismiss for lack of jurisdiction. The NRC filed its reply on January 2, 2002.
- On January 14, 2002, Mr. Bath and U.S. Robotech Inc., and its President filed with DOL a settlement agreement and release and joint motion to approve settlement agreement. On January 24, 2002, the DOL Administrative Law Judge (ALJ) issued a recommended decision and order approving the settlement agreement and dismissing Mr. Bath's complaint with prejudice. This monetary settlement agreement resolved all claims against U.S. Robotech and its President pursuant to 41 U.S.C. Section 265 as well as Section 211 of the ERA.
- On January 18, 2002, the DOL ALJ issued a recommended decision and order granting NRC's motion to dismiss, finding that neither the NRC nor its employees are subject to the employee protection provision of the ERA since they are not included as "employers" under that statute.
- On January 28, 2002, Mr. Bath appealed by petitioning for review of the January 18, 2002 decision and order. On March 4, 2002, Mr. Bath filed a brief in support of his appeal. On April 1, 2002, the NRC filed its reply to Mr. Bath's brief. This appeal is currently awaiting decision by the DOL Administrative Review Board.

Federal Tort Claims Act Claim

- On April 22, 2002, Mr. Bath filed a federal tort claim against NRC for \$330,000 alleging negligence by the NRC in handling the complainant's confidential disclosures. On September 17, 2002, the NRC requested Mr. Bath to provide additional information required by its regulations. On November 8, 2002, Mr. Bath provided its additional information. The claim is currently under consideration by the NRC.

2. LANNELL ALLEN

- On March 5, 2002, EER Systems, Inc., an NRC contractor, terminated Ms. Lanell Allen. It is our understanding that the termination was based on performance and conduct issues. In a letter dated September 9, 2002, Ms. Lanell Allen submitted an administrative claim under the Federal Torts Claims Act to the U.S. Nuclear Regulatory Commission. Ms. Allen's claim alleges that her termination was in retaliation for assistance provided to the NRC Office of Inspector General. The claim seeks relief for financial and emotional harm and damage to her reputation arising from her termination by her contract-employer. In order to process this claim, a letter dated September 17, 2002 was sent to Ms. Allen's counsel requesting additional information. In a letter dated February 24, 2003, Ms. Allen's counsel provided a partial response to the requested

information. Currently, the NRC is evaluating this information under its regulations implementing the Federal Tort Claims Act (10 CFR Part 14).

- As a consequence of Ms. Allen's tort claim alleging retaliation for providing assistance to OIG, the OIG initiated an inquiry. This inquiry is pursuant to the statutory and regulatory Whistleblower Protections for Contractor Employees provisions set forth under 41 U.S.C. Section 265 and Federal Acquisition Regulations Subpart 3.9.
- In addition, Ms. Allen raised concerns about the security of NRC's computer network at three nuclear power plants in Region IV. Specifically, she raised a concern about the location of NRC telephone and high speed data lines outside the Resident Inspector offices at licensee sites. The OIG is in the process of completing its inquiry related to this issue. However, NRC's staff's view is that the issue does not present a significant vulnerability primarily because of its location at secure licensee sites.
- The OIG is in the process of completing its inquiry regarding Ms. Allen's claim of retaliation. Once the OIG inquiry is concluded, the NRC will review the OIG findings and consider the appropriate course of action. We believe until the OIG completes its inquiry, NRC action at this time would be premature.

3. PETER KRAYER

- The NRC is not aware of a June 2001 formal complaint of retaliation by Mr. Krayer. However, the NRC is aware that in July 2001 Mr. Krayer verbally raised a concern about his treatment by his supervisor in the context of disputing a time and attendance matter.
- Mr. Krayer was removed from his position in the Federal service and the U.S. Nuclear Regulatory Commission on September 16, 2002 for misconduct, namely, submitting false data in an Official Agency Report. Mr. Krayer has alleged that the NRC's action was an act of retaliation initiated by his former supervisor. The NRC disagrees that unlawful retaliation was a motive in the decision to remove Mr. Krayer from his position.
- On October 18, 2002, Mr. Krayer appealed his removal to the Merit Systems Protection Board (MSPB). The matter was scheduled for an evidentiary hearing in Dallas, Texas, on April 24-25, 2003 before Administrative Judge Anna M. Love. However, the parties have reached a settlement as described in the next paragraph.
- Since October 18, 2002, the NRC's attorney and Mr. Krayer's attorney had discussed resolving the matter at various times but were unable to reach agreement. The matter was assigned to a settlement judge, MSPB Administrative Judge Daniel M. Turbitt. On March 10, 14, 18, 21, and 24, 2003, Mr. Krayer's attorney and the NRC's attorney participated in teleconferences with Administrative Judge Turbitt. The parties negotiated in good faith with the aim of settling the matter if possible so that a hearing would not be necessary. On March 25, 2003, the NRC and Mr. Krayer's attorney reached a settlement on all of Mr. Krayer's claims. The settlement will provide for monetary relief and reinstatement in a different position.

RESPONSES TO CONGRESSMAN MARKEY'S QUESTIONS

QUESTION 1.

Please provide me with copies of the last 3 employee survey reports for Region IV's DRMA, including the August 2001 report discussed above.

ANSWER

The reports you have requested are attached to this letter:

1. Memorandum to Kathleen J. Hamill, Director, Division of Resource Management and Administration (DRMA) from James L. Buchanan, Budget Analyst, Financial Resources Management Branch, Division of Resource Management and Administration and Joseph L. Lopez, Human Resources Specialist, Human Resources Staff, Division of Resource Management and Administration regarding DRMA Feedback Issues 2001, dated September 7, 2001;
2. M. Nicholas Mann, Resolution Dynamics, Inc., Preliminary Observations, dated July 11, 2002; and
3. Office of the Inspector General, U.S. Nuclear Regulatory Commission, Special Evaluation Report: OIG 2002 Survey of NRC's Safety Culture and Climate (OIG-03-A-03), dated December 11, 2002.

QUESTION 2.

What has Region IV done to correct these serious problems with employee morale?

ANSWER

Overall, morale in Region IV is good and improving based on the most recent surveys. The Region IV management team continues to focus on NRC values, which include integrity, respect and openness. The most recent activity in the DRMA feedback and organizational development process (see Preliminary Observations by Nick Mann of Resolution Dynamics, Inc.) reflects considerable progress. In fact, Mr. Mann's observations were that "there is a strong feeling in the staff as a whole that the Division Director has made positive changes in management approach and actions... and it is universally reported that the acting Financial Resource Management Branch (FRMB) and Information Resource Management Branch (IRMB) Chiefs have made a positive difference in the DRMA climate." Similarly, the most recent OIG Safety Culture and Climate survey of 2002 indicates that Region IV has the most favorable trends among the NRC's regional offices relative to organizational culture and climate.

QUESTION 3. What has NRC headquarters done to ensure these corrective actions are adequate and effective?

ANSWER

The NRC's Office of Human Resources provides advice to NRC managers, including Region IV, on creating a climate of trust and openness within their organizations. Experts in Organizational Development are available to work with managers and staff in an effort to improve communication, coordination, and cooperation within organizations at any level. During 2002, there were ongoing discussions with Region IV managers to address their efforts to improve and enhance morale in the Region. We believe that recent feedback and survey results reflect significant progress in this area.

The NRC also promotes labor-management partnerships to foster an open and constructive relationship between management and staff. Ongoing discussions on implementing partnership occur regularly between headquarters staff and Region IV management. Region IV has an effective labor-management partnership.

QUESTION 4. What has Region IV done to ensure that whistleblowers are able to come forward with their concerns without being retaliated against for doing so?

ANSWER

Region IV has a long history of promoting NRC's Open Door Policy. In the early to mid 1990s, the Region developed a Regional Office Policy Guide, Handling of Allegations of Improper Actions by NRC Staff or NRC Contractors. The NRC is considering a similar policy for adoption. This Policy Guide provides a formal process for individuals (who can remain anonymous) to use to report concerns to designated NRC officials (in addition to reporting to the OIG).

Also, the Region and the NRC fully support the Differing Professional View/Opinion (DPV/DPO) process reflected in NRC Management Directive 10.159. In fact, in recent years there have been several Region IV staff who have filed DPVs and DPOs who have subsequently been recognized through issuance of a Special Act Award by Region IV.

As part of a qualifications interview with every new inspector in the Region, the Regional Administrator specifically inquires about the inspector's understanding of the DPV/DPO process and how important it is to the organization. The discussion underscores the policy addressed in Management Directive 10.159 that retaliation against staff who file DPVs or DPOs will not be tolerated. Additionally, at all-hands current events meetings and in the RIV Roundup Newsletter (copy attached), the Regional Administrator has reminded and encouraged employees to feel free to use the Open Door Policy and the DPV process. Furthermore, he emphasizes the importance of ensuring that we don't "shoot the messenger" when individuals raise issues or concerns.

Regional management periodically invites the OIG staff and management to talk to the entire regional staff about the OIG role in the investigation of allegations of wrongdoing. Staff is not

only reminded of the opportunities for raising concerns outside the management chain, but their obligation to report misconduct. In addition, Region IV management is a strong supporter of the OIG Investigator Liaison program, providing regular, unrestricted access for Region IV employees to speak privately with OIG investigative staff.

For the joint OIG/Secret Service investigation of Satellite TV during 2000-2001, Region IV management was aware of the involvement of only one individual in Region IV in providing support and assistance to the OIG during its investigation. That employee was privately presented, by OIG and in the presence of her management chain, a significant cash award for her special service. Later, the Region IV Administrator presented this award to the employee in front of the assembled Region IV staff. He reinforced the value of integrity as well as the valuable service this employee performed for the Region and the NRC.

QUESTION 5. What has NRC headquarters done to ensure that these measures are effective?

ANSWER

The NRC fully supports an Open Door policy and has developed a formal Management Directive (MD 10.160) to provide appropriate guidance and procedures to NRC staff.

The NRC promotes its Differing Professional Views and Opinion (DPV/DPO) policy, and has periodically reviewed the policy and its implementation. The most recent review of the DPV/DPO policy focused on issues related to preventing retaliation and ensuring appropriate recognition of the contributions of those who raise issues through the DPV/DPO process. The union had a fully participating representative on the task group that most recently performed this review.

Specifically for Region IV, headquarters arranged for our organizational development consultant M. Nicholas Mann of Research Dynamics to conduct a team building for the Region IV DRMA organization.

QUESTION 6. Does the Commission believe that a legislative remedy is required to ensure that NRC contractor employees who are retaliated against by NRC employees, such as Mr. Bath and Ms. Allen, have recourse? If so, please provide suggested legislative language. If not, then why haven't their cases been settled?

ANSWER

As noted in Enclosure 1, Mr. Bath did reach a monetary settlement with U.S. Robotech Inc. and its President that resolved all claims against them pursuant to 41 U.S.C. § 265. Nevertheless, the Commission does not believe that the NRC has engaged in unlawful retaliation against the two contractor employees in question. Assuming that NRC employee actions against a contractor employee are improper, the contractor employer has the ultimate responsibility for deciding whether to take an action against that employee. If the contractor employer takes

such an action for ill-advised reasons (including any illegal actions based on the retaliatory intent of NRC employees) the contractor employee has an adequate remedy. Thus, we do not believe a legislative remedy is necessary. First, there is a statutory prohibition (41 U.S.C. § 265) against discharging, demoting or otherwise discriminating against a contractor employee as reprisal for disclosing to a member of Congress or an authorized official of an agency or the Department of Justice information relating to a substantial violation of law related to a contract. The statute explicitly permits the contractor employee to submit a complaint about prohibited reprisal conduct to the NRC's IG for investigation. (41 U.S.C. § 265(b)). Furthermore, the statute expressly provides the contractor employee certain remedies and there is a provision for enforcement. Under 41 U.S.C. § 265(e), the head of the agency is authorized to take one of three actions where there is a finding that the contractor employee has been subjected to the prohibited reprisal conduct. The head of the agency may order the contractor to: (1) abate the reprisal; (2) reinstate the employee to the same position along with compensation (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if reprisal had not occurred; and (3) pay the employee an amount equal to the total amount of all costs and expenses (including attorneys' fees and expert witness fees) that were reasonably incurred by the employee in bringing the complaint of reprisal, as determined by the head of the agency 41 U.S.C. § 265 (c)(1). Also, the head of the agency is required to file an action for enforcement of such an order where there is a failure to comply with that order. Moreover, the contractor employees affected or aggrieved by any such order of the head of the agency may obtain review in the United States Court of Appeals in a Circuit where the reprisal is alleged to have occurred. 41 U.S.C. § 265 (c)(3). Thus, this statute already provides an effective mechanism to investigate whistleblower claims raised by contractor employees and provide relief in appropriate cases.

In addition, the NRC's acquisition regulations (48 CFR Subpart 2042.570) explicitly mandate the inclusion in contracts for professional services a provision that permits contractor employees to express health and safety related concerns associated with the contractor's work that may differ from a prevailing NRC staff view. Furthermore, at the time of award of a contract, NRC informs its contractors of the availability of the IG Hotline as a means of reporting fraud, waste, and abuse within the NRC programs and its contracting operations.